

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THOMAS E. PATRICK,

Plaintiff and Appellant,

v.

MICHAEL P. RUBIN et al.,

Defendants and Respondents.

B199981

(Los Angeles County
Super. Ct. No. BC358951)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part, reversed in part, and remanded with directions.

Knickerbocker Law Corporation and Richard L. Knickerbocker for Plaintiff and Appellant.

Michael P. Rubin & Associates and Erika S. Lipcsey for Defendants and Respondents.

Thomas E. Patrick filed a malicious prosecution action against Michael P. Rubin. The trial court sustained Rubin's demurrer on the basis that Patrick had not shown that the underlying action resulted in a favorable termination, and denied leave to amend. Patrick appeals. We affirm the trial court's sustaining of Rubin's demurrer but reverse its denial of leave to amend.

FACTS

Rubin filed a lawsuit in Los Angeles Superior Court at the end of 2004 against Patrick and Anibal X. Mateus. Rubin's complaint alleged that Rubin and Mateus had a written partnership agreement to purchase real property from Patrick, and that Mateus breached the agreement by making a deal to purchase the real property from Patrick without Rubin's participation. Rubin requested specific performance on behalf of the partnership (and related relief), and recorded a lis pendens against the real property. Rubin later withdrew the lis pendens and dismissed Patrick from the suit after a hearing on September 22, 2005, proceeding against Mateus alone.

On September 21, 2006, Patrick filed an action against Rubin for malicious prosecution. Patrick's first amended complaint alleged that Rubin's voluntary dismissal of Patrick from the underlying lawsuit was a favorable termination, that the lawsuit was without probable cause, and that it was brought with malice. Rubin filed a demurrer. On April 17, 2007, after a hearing, the trial court concluded that Patrick's complaint did not allege facts showing favorable termination of the underlying lawsuit. The court sustained the demurrer without leave to amend.

DISCUSSION

““““We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . .’ When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. . . . And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial

court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. . . . The burden of proving such reasonable possibility is squarely on the plaintiff. . . .” (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1424, citations omitted.)

I. The complaint failed to state facts showing favorable termination

To state a claim for malicious prosecution, a complaint must allege the bringing of a civil action by the defendant and the action’s favorable termination for the malicious prosecution plaintiff. (*Pollock v. University of Southern California*, *supra*, 116 Cal.App.4th at p. 1429.) “In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff’s innocence of the misconduct alleged in the lawsuit.” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342.) The trial court examines the record “to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed. If resolution of the underlying action leaves a residue of doubt about the plaintiff’s innocence or liability, it is not a favorable termination sufficient to support a cause of action for malicious prosecution.” (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1391; see *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592 [considering underlying judgment as a whole on review of trial court’s sustaining of demurrer for lack of favorable termination].)

Patrick’s complaint states that the evidentiary hearing on Rubin’s action for specific performance “bore on the merits of the complaint,” “the trial Judge made findings on the merits,” and “[u]nder the circumstances, the dismissal and the withdrawal of the lis pendens constituted a favorable termination of the underlying action.” But Rubin’s voluntary dismissal of Patrick as a defendant is not necessarily a judgment on the merits constituting a termination in Patrick’s favor. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056-1057.) “The focus is not on the malicious prosecution plaintiff’s opinion of his *innocence*, but on the opinion of the dismissing party. [Citation.] ‘The test is whether or not the termination tends to indicate

the innocence of the defendant or simply involves technical, procedural, or other reasons that are not inconsistent with the defendant's guilt.” (*Ibid.*)

Patrick bears the burden of showing that the trial court erred in sustaining the demurrer to his complaint. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1263.) It is also his burden to provide us with a record on appeal that establishes error, and “where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271.) On a demurrer, “[t]he court does not . . . assume the truth of contentions, deductions, or conclusions of law” (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1003), such as Patrick's bare statements that the voluntary dismissal was “on the merits” or a “favorable termination.” Patrick merely stated a legal conclusion that the action was dismissed on the merits and constituted a favorable termination in his favor. We agree with the trial court that the complaint did not state adequate facts, and we therefore affirm the trial court's sustaining of the demurrer.

II. The trial court abused its discretion in denying leave to amend

At the hearing on the demurrer, Patrick argued that the trial court in the underlying action made specific factual findings showing that Rubin had filed the underlying action for specific performance without any reasonable or probable cause. Patrick sought leave to amend the complaint to include specific facts showing that Rubin dismissed him from the underlying suit because Rubin knew the suit was without merit. Nevertheless, the trial court denied Patrick leave to amend.

“‘[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.’ [Citation.]” (*Patrick v. Alacer Corp.*, *supra*, 167 Cal.App.4th at p. 1003.) At the hearing Patrick promised to amend the complaint to include specific allegations drawing on the record in the underlying case, which would show that when Rubin dismissed him from the underlying suit, Rubin did so because he knew there was no basis for continuing against Patrick. Because Patrick showed “in what manner [he] can amend [his] complaint and how that amendment will change the legal effect of [his]

pleading” (*In re Social Services Payment Cases, supra*, 166 Cal.App.4th at p. 1274), he has met his burden to demonstrate that the trial court abused its discretion in denying leave to amend. We reverse the trial court’s denial of leave to amend.

DISPOSITION

The trial court’s order sustaining Rubin’s demurrer to Patrick’s complaint is affirmed. The denial of leave to amend is reversed, and the case is remanded for Patrick to file an amended complaint. Each party to bear his own costs on appeal.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.